SUPREME COURT, U.S.
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No. 96-1326

In the Supreme Court of the United States

OCTOBER TERM, 1996

HANDICABS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board reasonably concluded that petitioner's rule prohibiting employees from "discussing complaints or problems about the company with [its] clients" violates Section 8(a)(1) of the National Labor Relations Act by unduly interfering with employee activity protected by the Act.

2. Whether the Board's finding that petitioner discharged one of its employees because of his union activity, in violation of Section 8(a)(3) and (1) of the Act, was supported by substantial evidence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 95 F.3d 681. The decision and order of the National Labor Relations Board (Pet. App. A11-A12), including the decision of the administrative law judge (Pet. App. A12-A48), are reported at 318 N.L.R.B. 890.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 1996. A petition for rehearing was denied on November 26, 1996. Pet. App. A10. The petition for a writ of certiorari was filed on February 20, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8(a)(1) of the National Labor Relations Act (NLRA or Act), 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7 of the Act. Section 7, 29 U.S.C. 157, provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations * * * and to engage in other concerted activities for the purpose of * * * other mutual aid or protection." Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

2. Petitioner provides transportation services to senior citizens and disabled persons in the Minneapolis-St. Paul metropolitan area. Pet. App. A13; Pet. 4. Petitioner's employee handbook contained a section known as "policy addendum no. 2." That section provided, among other things, that "[d]iscussing complaints or problems about the company with our clients will be grounds for immediate dismissal" (the "discussion rule"), and that "you must not put [clients] in a threatening or uncomfortable position by discussing any personal or company-related problems that may make them feel coerced or obligated to act upon or react to" (the "discomfort rule"). Pet. App. A14-A15.[1]

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[1] The quoted sentences (which we have labelled as separate "rules" for convenient reference) are the "italicized portions" referred to in the Board's decision at Pet. App. A14. See 318 N.L.R.B. at 891 (emphasis added by the Board). The italics are

In 1994, a union local began an organizing campaign among petitioner's drivers. Pet. App. A15. A certification election was scheduled for October 14. *Id.* at A16. Ronald Trail, one of petitioner's drivers, distributed authorization cards to his fellow drivers and spoke with them about the union. *Ibid.* Until September 20, 1994, petitioner was unaware that Trail supported the union. *Id.* at A36.

On September 20, Claudia Fuglie, who was both an employee and a disabled client of petitioner, told Gary Nord, Trail's supervisor, that Trail was a union supporter. Pet. App. A18, A20, A32. Nord reported that conversation to Joyce Doerffler, petitioner's president, who in turn spoke directly with Fuglie. *Id.* at A18. Although there was conflicting testimony concerning Fuglie's conversations with Trail, Nord, and Doerffler, the administrative law judge (ALJ) concluded that Fuglie based her statement on a conversation she had had with Trail about a week earlier, wherein Trail expressed his belief that petitioner was engaged in "unequal treatment" of its employees, and that such "inequities" could be corrected were the union "voted in." *Id.* at A18, A27-A28, A32. Fuglie was vehemently opposed to unions. *Id.* at A28-A29.

Petitioner fired Trail at the end of his shift on September 20. Pet. App. A16, A18. When Trail asked why he was being fired, Nord explained only that

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missing from the decision as it is reprinted in the appendix to the petition.

Petitioner's employee handbook also contained a rule prohibiting employees from discussing their wages among themselves, on pain of "immediate termination." Pet. App. A14. The Board and the court of appeals accepted petitioner's concession that that rule was unlawful (*id.* at A5, A14, A43 n.5), and petitioner does not challenge that holding in this Court.

"we've got a complaint against you." *Id.* at A16. Although Nord refused to give Trail any details, the evidence before the ALJ established that Trail's termination was based on Fuglie's statements to Nord and Doerffler earlier the same day. *Id.* at A16-A18. When Trail requested "something in writing" (*id.* at A16), Nord gave him a copy of petitioner's "policy addendum no. 2." *Id.* at A16-A18. Trail also received a copy of a memorandum from Nord, dated the same day and addressed to all petitioner's drivers. *Id.* at A16-A17. That memorandum stated that "some passengers have complained that drivers have been hassling them with complaints and problems regarding potential unionization," and that "[m]any passengers are scared and fearful that unionization would mean a strike and loss of service." *Id.* at A17. It concluded by warning drivers: "[R]egardless of your personal beliefs regarding this union thing, please do not trouble our passengers with your problems. Failure to comply with this policy will result in immediate dismissal." *Ibid.*

3. On September 21 (the day after his discharge) Trail filed a complaint with the National Labor Relations Board (the Board), charging that petitioner had engaged in an unfair labor practice by firing him. Pet. App. A13. On October 27, 1994, the Board's General Counsel issued a complaint against petitioner, alleging violations of Section 8(a)(1) and (3) of the Act. Pet. App. A12-A13.

After an evidentiary hearing (see Pet. App. A12), the ALJ found that petitioner's "discussion" and "discomfort" rules, quoted above, violated Section 8(a)(1) of the Act. Pet. App. A35, A43. The ALJ explained that, generally speaking, employees engage in activity protected by the "mutual aid or protection" clause

of Section 7 "when they seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." Pet. App. A33 (quoting *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 565 (1978)). He recognized that communications with third parties may be unprotected where they "do not relate to labor practices of the employer, such as disparaging the employer's reputation or quality of its product," or if they are "maliciously motivated." Pet. App. A33. He held, however, that the challenged rules were "not limited to those types of [unprotected] communication." *Ibid.* Rather, the discussion rule was "too extensive," because it "expressly prohibit[ed] statutorily protected activity." *Id.* at A33, A35. The discomfort rule, although "somewhat less sweeping," was impermissible because it "condition[ed] [a] violation * * * on the subjective reaction of the passenger," thereby creating "an inherent danger to the exercise of [the] drivers' statutory right to communicate." *Id.* at A33.

The ALJ considered petitioner's contentions that its disabled clients are "not necessarily able to handle stress or difficulties in the manner of a non-disabled person," and that petitioner should therefore be entitled, by reason of the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.* (ADA), and Minnesota's Vulnerable Adults Act (VAA), to "greater latitude to formulate and implement a more stringent * * * rule intended to protect passengers from speech and action which might be upsetting, even threatening, to them." Pet. App. A15, A32-A35. The ALJ acknowledged that petitioner "has an obligation to protect passengers from abuse and mistreatment," and that "some words and conduct do cause greater concern

for a vulnerable person than is the fact for other individuals." *Id.* at A32-A33. Nonetheless, the ALJ held that petitioner's rule was overbroad, because it "potentially prevents employees from publicizing any aspect of a labor dispute with [petitioner] * * * for fear that a single client may come to feel threatened or uncomfortable." *Id.* at A34. Such a rule, he concluded, "hardly strikes a reasonable balance between protection which Congress sought to extend to the handicapped and challenged segment of the public [under the ADA] and the rights which Congress sought to provide for employees under the [NLRA]." *Id.* at A34-A35. The ALJ suggested that petitioner could lawfully satisfy its obligations to its disabled passengers by implementing a rule prohibiting any "driver communications intended to threaten or cause passengers to become apprehensive, and * * * communications naturally likely to have that effect." *Id.* at A33.

The ALJ also found that petitioner had unlawfully discharged Trail, not because he had violated company rules, but because he supported the union. Pet. App. A43.[2] After extensively reviewing and evaluating the evidence before him (see *id.* at A13-32, A36-A41), the ALJ found "no credible evidence that Trail engaged

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[2] Petitioner moved to dismiss this aspect of the complaint on the ground that petitioner's motivation for discharging Trail had been conclusively determined by a decision of the Minnesota Department of Economic Security, which ruled that Trail was not entitled to unemployment benefits because he had been discharged for misconduct. Pet. App. A35-A36. The ALJ denied petitioner's motion, in part because "no consideration was accorded to the unfair labor practice motivation issue" in the state proceeding. *Id.* at A36. Petitioner does not challenge that ruling in this Court.

in any actual misconduct which frightened passengers," or that petitioner was "actually motivated by a[ny] legitimate reason which, absent Trail's union sympathies and activities, would have motivated [it] to discharge Trail, in any event, on September 20." *Id.* at A42. The ALJ noted that, even if petitioner had discharged Trail for violating its rules, the discharge would have been unlawful, because the rules were themselves unlawful. *Id.* at A41. In fact, however, he found that the discharge was "motivated by animus toward [Trail's] union involvement or, at least, suspected involvement" (*ibid.*), and was intended "as a warning to other drivers when they cast their ballots in the representation election conducted 24 days later" (*id.* at A32).

The Board affirmed the ALJ's rulings, findings and conclusions, and adopted his recommended order. Pet. App. A11-A12. That order requires petitioner, among other things, to "[r]escind work rules which * * * prohibit employees from discussing with passengers and clients job-related problems and complaints," and to offer Trail reinstatement with back pay. *Id.* at A45.

3. The court of appeals enforced the Board's order. Pet. App. A1-A9. The court noted that, contrary to petitioner's characterization of its rules as "limited in time or place," petitioner had "broadly prohibit[ed] all [employee] discussions with clients about company complaints." *Id.* at A7. It agreed with the Board that petitioner's discussion rule impermissibly forbade "all discussion of working conditions with clients even if the communication were intended to enlist their support for protected concerted activity," and that the discomfort rule "potentially prevents employees from discussing any aspect of a labor dispute and from appealing for support from the public for

fear that a single client may feel threatened or uncomfortable." *Ibid.* Noting the Board's recognition of petitioner's interest in protecting its clients, as well as the federal interest in enforcement of the labor laws, the court observed that "Congress and the courts rely on the Board to strike the appropriate balance between such conflicting legitimate interests." *Id.* at A6-A7. The court concluded that the ALJ's decision, as adopted by the Board, "is well-reasoned and strikes an appropriate balance between Handicabs' responsibility to its passengers and the employees' rights under the Act." *Id.* at A8. The court therefore "defer[red] to the Board's decision that policy addendum no. 2, as currently written, violates the Act because its prohibition of protected organizing activity is too extensive." *Ibid.*

The court rejected petitioner's contention that the Board's order "violate[s] or conflict[s] with the ADA or the Minnesota Vulnerable Adults Act." Pet. App. A8. The court observed that petitioner's "impermissible generalization about persons with disabilities—that all persons who ride handicapped-accessible, public transit services will be disturbed by talk of union activity [—] cannot bring its policy under the protection of the disability laws." *Ibid.* Moreover, "[t]he Board's decision does not prevent or even discourage [petitioner] from taking the appropriate steps to protect its passengers. It simply informs the company that it cannot blatantly trample its employees' rights with a rule that speaks generally of protecting passengers yet targets only the discussion of company-related problems." *Ibid.* The court noted that "[t]he Board's decision leaves open the opportunity for [petitioner] to design a neutral rule that does not single out activity protected under

the Act, but rather focuses on all speech and conduct that harms its passengers." *Ibid.*

Finally, the court reviewed the grounds for the Board's finding that petitioner discharged Trail because of his union activity, and concluded that the Board's finding was supported by substantial evidence. Pet. App. A9. The court therefore enforced the Board's order in its entirety.

ARGUMENT

1. The right to engage in concerted activities for "mutual aid or protection" under Section 7 of the National Labor Relations Act includes the right of employees to solicit the support of third parties in their organizational efforts or other concerted activity, so long as the employees' communication does not disparage the employer's reputation or product and is not maliciously motivated. See Pet. App. A33; *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 565 (1978).[3] The Board reasonably concluded that the

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[3] See also *NLRB* v. *Local Union No. 1229, IBEW (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464, 475 (1953) (distinguishing "acts of insubordination, disobedience or disloyalty"); *Kinder-Care Learning Centers, Inc.*, 299 N.L.R.B. 1171, 1171-1172 (1990) (rejecting work rule that prohibited childcare employees from discussing with parents terms and conditions of employment or work-related problems); *Cincinnati Suburban Press, Inc.*, 289 N.L.R.B. 966, 967-968 (1988) (employee's article about employer's opposition to an organizing campaign, which was published in a local journal, was protected activity); *Local No. 980, UAW*, 280 N.L.R.B. 1378, 1381 (1986) (employee's provision of information about a labor dispute with her employer to a reporter for a newspaper article was protected activity), enforced, 819 F.2d 1134 (3d Cir. 1987). Cf. 29 U.S.C. 158(b)(7)(C) (second proviso) (permitting, under certain circumstances, "any picketing or other publicity for the purpose of truthfully advising the public (including

"discussion" and "discomfort" rules (see page 2, *supra*) set out in petitioner's "policy addendum no. 2" violated Section 8(a)(1), by interfering with the exercise of a right protected by Section 7 in a manner that was broader than necessary to protect petitioner's disabled clients. Pet. App. A15, A32-A35.

As the Board explained, petitioner's discussion rule flatly prohibits "[d]iscussing complaints or problems about the company with our clients," while the discomfort rule prohibits discussion of "company-related problems" based on "the subjective reaction of the passenger," thereby creating "an inherent danger to the exercise of [the] drivers' statutory right to communicate 'through channels outside the immediate employee-employer relationship.'" Pet. App. A33-A34 (quoting *Eastex*, 437 U.S. at 565). The rules are not limited to communications of a disparaging or malicious nature; and petitioner adduced "no reliable evidence" that Trail (or any other driver) acted maliciously or disparagingly in this case. Pet. App. A34; see *id.* at A42.

The Board acknowledged petitioner's "obvious[] * * * obligation to protect passengers from abuse and mistreatment by drivers" (Pet. App. A32), but it concluded (*id.* at A34-A35) that the challenged work rules swept so broadly that they failed to "strike[] a reasonable balance between protection which Congress sought to extend to the handicapped and challenged segment of the public and the rights which Congress sought to provide for employees under the [NLRA]." The court of appeals affirmed the Board's "well-reasoned" decision, correctly recognizing that

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consumers) that an employer does not employ members of, or have a contract with, a labor organization").

"Congress and the courts rely on the Board to strike the appropriate balance between such conflicting legitimate interests." *Id.* at A7-A8. There is no reason for further review.

2. Petitioner argues (Pet. 11-13) that the Board and the court of appeals should have sustained its work rules because its clients should be treated like the hospital patients whose special situation this Court considered in *NLRB* v. *Baptist Hosp., Inc.*, 442 U.S. 773 (1979), and *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483 (1978). That argument is not persuasive.

The Board has long held that, because "a tranquil atmosphere is essential to the carrying out of" a hospital's primary patient-care function, a work rule prohibiting employees from engaging in protected activity (such as union solicitation) "in strictly patient care areas, such as the patients' rooms, operating rooms, and places where patients receive treatment" is presumptively lawful under Section 8(a)(1). *St. John's Hosp. & School of Nursing, Inc.*, 222 N.L.R.B. 1150, 1150-1151 (1976), enforced in part, 557 F.2d 1368 (10th Cir. 1977). Outside immediate patient-care areas, however, such a prohibition is presumptively unlawful, and will be struck down unless the employer can show that permitting protected activity would actually disrupt patient care. *Ibid.*; see also *Baptist Hosp.*, 442 U.S. at 778-779 & n.8 (collecting cases); *Beth Israel Hosp.*, 437 U.S. at 494-495. In *Beth Israel Hospital*, this Court upheld the Board's "general approach" as consistent with the Act (437 U.S. at 507), and affirmed the Board's conclusion that a hospital had not overcome the presumption that protected activity should be permitted in the hospital cafeteria (*id.* at 501-502). In *Baptist Hospital*, the Court affirmed the Board's conclusion that a hospital

had not overcome the presumption with respect to union solicitation in the cafeteria, gift shop, and first-floor lobbies, but disagreed with the Board with respect to solicitation in corridors and sitting rooms on patient floors, holding that the hospital had sufficiently justified its prohibition as to those areas. 442 U.S. at 782-787.

Petitioner's reliance on *Baptist Hospital* and *Beth Israel Hospital* depends on analogizing its clients and vehicles to hospital patients and "immediate patient care areas." If petitioner's business amounted to an ambulance service, transporting disabled persons exclusively to medical facilities for the purpose of receiving medical care, those analogies might be appropriate. In the case, however, of a service that provides persons whose disabilities do not require immediate medical care with transportation for a variety of ordinary purposes, such as going to work or shopping, the analogy to hospital patients has little force.

Petitioner's clientele comprises "senior and disabled persons." Pet. App. A13. Petitioner did not, however, compile below the type of complete or particularized record that might have supported the analogies that it now attempts to draw. Indeed, to the extent that the record sheds light on the question, it suggests that petitioner's witness (and employee) Claudia Fuglie, a paraplegic who suffers from spina bifida, used petitioner's service primarily to go to and from work. *Id.* at A18-A19, A26.[4] Although petitioner

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[4] Jan Snook, another of petitioner's disabled riders, lived independently with her husband and was employed as a secretary at a local hospital. Pet. App. A30; Tr. 93-94. The record

now argues (Pet. 11) that clients "[o]ften * * * use [its] transportation to get to medical facilities" and that "[p]ersons with disabilities are more likely to be receiving medical attention for chronic problems than the average population," its restrictions on employee speech were not limited to situations involving transportation for medical services. Those assertions are, in any event, not an adequate substitute for record evidence concerning petitioner's actual operations. Moreover, the same generalizations might be made about senior citizens or veterans, yet one would not ordinarily think of either group as analogous to hospital patients.[5] Thus, petitioner provided the Board with no factual basis on which to conclude that the specialized presumption applicable to hospitals and immediate patient-care settings should be extended to petitioner's facially very different situation. Neither the Board nor the court of appeals erred in failing to accept petitioner's argument in the absence of any evidentiary foundation.

For the same reason, there is no merit to petitioner's suggestion (Pet. 13-15) that there is a "conflict developing between the Circuit Courts" (Pet. 15) on the applicability of the hospital presumption. Compare *ibid.* (case is "one of first impression").

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suggests that Snook also used petitioner's service to commute to work. Tr. 96-97.

[5] Petitioner's argument (Pet. 11) that its clients are dependent on its services similarly fails to distinguish petitioner's clients from persons who are not elderly or disabled, but who may rely just as completely on public transportation. Moreover, it is not self-evident that the NLRA should be interpreted to favor keeping those who are particularly reliant on an employer's services ignorant, for that reason alone, of a labor dispute that could affect those services.

The case petitioner cites, *Aroostook County Regional Ophthalmological Center* v. *NLRB*, 81 F.3d 209 (D.C. Cir. 1996), involved small medical facilities where physicians consulted with patients and performed eye surgery. *Id.* at 210. The court sustained a work rule that prohibited employees from "discuss[ing] any grievances 'within earshot of patients'" (*id.* at 211), noting that the case involved no "large facilities where the distinction between patient and non-patient areas can easily be discerned," and that the operator of a "small medical practice" had "unique concerns about employees acting in a way that might disturb patients." *Id.* at 213. Nothing in *Aroostook County* addressed the application of the hospital presumption to transportation services, and there is no reason to believe that the D.C. Circuit would have decided the present case any differently than did the court below.

3. Petitioner contends (Pet. 16) that the Board "refus[ed] to consider the ADA and the Vulnerable Adults Act." Petitioner does not argue, however, that anything in the decisions below directly violates, or requires petitioner to violate, the ADA or the VAA.[6]

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[6] It is not clear that petitioner would be a proper party to seek to vindicate rights that may be accorded to its passengers under either Act. In any event, although petitioner cites (Pet. 3, 13) 42 U.S.C. 12203(b), which makes it "unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of * * * any right granted or protected by" the ADA, petitioner does not explain why the conduct at issue in this case should be deemed to violate that provision. Nor does petitioner explain how that conduct, which the ALJ specifically found (Pet. App. A42) did not and was not intended to frighten petitioner's passengers, could have violated the VAA's prohibition against "intentionally abus[ing] or neglect[ing] a vulnerable adult." Minn. Stat. Ann.

Petitioner claims only that the Board failed to take sufficient account of the interests reflected in those Acts, and of petitioner's interest in protecting its disabled or otherwise vulnerable clients.

As the court of appeals pointed out, however, "the Board recognized that [petitioner] has a responsibility to protect persons with disabilities from harassment or harm." Pet. App. A6; see *id.* at A32. Specifically, the Board acknowledged that "some words and conduct do cause greater concern for a vulnerable person than * * * for other individuals." *Id.* at A32-A33.[7] Thus, the Board did consider petitioner's ADA and VAA arguments in deciding whether the challenged work rules violated the NLRA. *Id.* at A15,

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§ 626.557 (subd. 19) (West 1983). Indeed, in light of Congress's declaration, in the ADA, that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals" (42 U.S.C. 12101(a)(8)), the court of appeals properly observed (Pet. App. A8) that petitioner's "impermissible generalization about persons with disabilities—that all persons who ride handicapped-accessible, public transit services will be disturbed by talk of union activity [—] cannot bring its policy under the protection of the disability laws." It would, indeed, be condescending to the intended beneficiaries of those laws to interpret them as placing so high a premium on keeping those persons in ignorance of information freely available to others. See *id.* at A32 (one purpose of the ADA is to eliminate discrimination against disabled individuals, "not to promote further patronization of them").

[7] The ALJ noted that he himself is partially disabled. Pet. App. A29 n.4. Petitioner's suggestions of insensitivity or bias (see Pet. 14-15) are therefore particularly unpersuasive. See also Pet. App. A11 n.2.

A32-A35.[8] As the Board noted, however, "nothing in the * * * [ADA] provides for modification of rights guaranteed [to] employees by the [NLRA]." *Id.* at A32. The Board sought to reconcile protection of those rights with petitioner's legitimate concerns by requiring that work rules intended to protect vulnerable clients be "narrowly tailored to avoid unnecessary deprivation of employees' statutory rights." *Id.* at A33. After considering the matter (*id.* at A33-A34), the Board concluded (*id.* at A35) that petitioner's rules were not so tailored. The court of appeals reviewed the matter and affirmed. *Id.* at A8.

The Board's conclusion was reasonable. Petitioner's work rules prohibited communications protected by the Act without regard to whether they posed any objective threat of harm to vulnerable passengers. Pet. App. A7, A33. Moreover, petitioner's rules discriminated against protected communications by prohibiting them, completely or on the basis of anticipated subjective harm, while permitting discussion of all other subjects without regard to potential harm. See *id.* at A8, A33-A35. Both the Board and the court made clear that petitioner was free to design work rules to address its concerns, so long as those rules are narrowly tailored and are neutrally written and enforced. *Id.* at A8,

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[8] Petitioner misinterprets (Pet. 16) the Board's reference (Pet. App. A35) to Section 10(a) of the NLRA, 29 U.S.C. 160(a). The Board cited Section 10(a), not in connection with the ADA or the VAA, but in explaining why a state agency's finding, for unemployment benefits purposes, that Trail had been discharged for misconduct did not control the Board's decision in this case. See Pet. App. A35-A36; see also note 2, *supra*.

A33. Those essentially fact-bound determinations do not warrant this Court's review.

4. Finally, petitioner takes issue (Pet. 18-20) with the Board's conclusion that it discharged Trail because of his union activity, in violation of Section 8(a)(3) and (1) of the Act. Petitioner is mistaken, however, when it argues (Pet. 18) that "[t]he resolution of this issue is determined by the level of protection afforded to the disabled." It depends, instead, on the ALJ's independent factual finding (Pet. App. A42), adopted by the Board (*id.* at A11), that petitioner fired Trail, not because of his violation of work rules or because of any concern petitioner had for its disabled clients, but to punish Trail for his involvement with the union, and "as a warning to other drivers when they cast their ballots in the representation election conducted 24 days later" (*id.* at A32). That finding resulted from a careful review of all the evidence. *Id.* at A36-A42). The court of appeals properly held (*id.* at A9) that the Board's conclusion was supported by substantial evidence, and there is no reason for further review. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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